

SENATE, No. 2668

[January 4, 2011- Text of the Senate amendment (Ways and Means) to the House Bill relative to home service contracts H.4957]

The Commonwealth of Massachusetts

In the Year Two Thousand and Ten

1 SECTION 1. Sections 149F to 149L, inclusive, of chapter 175 of the General Laws are
2 hereby repealed.

3 SECTION 2. Said chapter 175 is hereby further amended by inserting after section 149L
4 the following 12 sections:-

5 Section 149M. As used in sections 149M to 149X, inclusive, the following words shall,
6 unless the context clearly requires otherwise, have the following meanings:-

7 “Administrator”, the person who is responsible for the administration of the service
8 contracts or the service contracts plan.

9 “Consumer”, an individual who purchases, other than for purposes of resale, tangible
10 personal property used for personal, family or household purposes.

11 “NAIC”, the National Association of Insurance Commissioners.

12 “Person”, a natural person, corporation, association, partnership or other legal entity.

13 “Premium”, the consideration paid to an insurer for a reimbursement insurance policy.

14 “Provider”, a person who is contractually obligated to the service contract holder under
15 the terms of the service contract.

16 “Reimbursement insurance policy”, a policy of insurance issued to a provider to either
17 provide reimbursement to the provider under the terms of the insured service contracts issued or
18 sold by the provider or, in the event of the provider’s nonperformance, to pay on behalf of the
19 provider all covered contractual obligations incurred by the provider under the terms of the
20 insured service contracts issued or sold by the provider.

21 “Service contract”, a contract for a separately stated consideration and for a specific
22 duration to perform the service, repair, replacement or maintenance of real, tangible personal
23 property or indemnification for service, repair, replacement or maintenance, for the operational
24 or structural failure due to a defect in materials or workmanship or normal wear and tear, with or
25 without additional provision for incidental payment or indemnity under limited circumstances,
26 for related expenses, including, but not limited to, rental and food spoilage.

27 “Service contract holder”, a consumer who is in possession of a service contract.

28 “Warranty”, a guarantee incidental to the sale of the product made solely by the
29 manufacturer, importer or seller of property or services; provided, however that consideration
30 that is negotiated or separated from the sale of the product that guarantees indemnity for
31 defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as
32 repair or replacement of the property or repetition of services shall not be included within the
33 definition of “warranty.”

Section 149N. (a) A provider may appoint an administrator or other designee to be responsible for the administration of service contracts executed under sections 149M to 149V, inclusive.

(b) Service contracts shall not be issued, sold or offered for sale unless the provider has provided: (1) a receipt for, or other written evidence of, the purchase of the service contract to the contract holder; and (2) a copy of the service contract to the service contract holder within a reasonable period of time from the date of purchase.

(c) A provider of service contracts shall file a registration with the commissioner which shall include, without limitation, the provider's name, address, phone and contact person and a designated person in the commonwealth for service of process. Each provider shall pay to the commissioner a fee of \$600 upon initial registration and upon renewal which shall occur every 3 years thereafter.

(d) In order to assure the faithful performance of a provider's obligations to its contract holders, each provider shall:

(1) insure all service contracts under a reimbursement insurance policy issued by an insurer that is authorized, registered or otherwise permitted to transact insurance in the commonwealth or a surplus lines insurer authorized to do business in the commonwealth; provided, that the reimbursement insurance policy shall be obtained from an insurer that: (i) at the time the policy is filed with the commissioner, and continuously thereafter, maintains surplus as to contract holders and paid-in capital of at least \$15,000,000 and annually files copies of the insurer's financial statements, its NAIC annual statement and an actuarial certification if required

and filed in the insurer's state of domicile; or (ii) at the time the policy is filed with the commissioner, and continuously thereafter, maintains surplus as to policyholders and paid-in capital of less than \$15,000,000 but at least \$10,000,000, demonstrates to the satisfaction of the commissioner that the insurer maintains a ratio of net written premiums, wherever written, to surplus as to contract holders and paid-in capital of not greater than 3 to 1, and annually files copies of the insurer's financial statements, its NAIC annual statement and an actuarial certification if required and filed in the insurer's state of domicile;

(2) (i) maintain a funded reserve account for its obligations under its contracts issued and outstanding in the commonwealth; provided that the reserve account shall not be less than 40 per cent of gross consideration received, less claims paid, on the sale of the service contract for all in-force service contracts and shall be subject to examination and review by the commissioner; and (ii) place in trust with the commissioner a financial security deposit, having a value of not less than 5 per cent of the gross consideration received, less claims paid, on the sale of the service contract for all service contracts issued and in force, but not less than \$25,000, consisting of 1 of the following: a surety bond issued by an authorized surety, securities of the type eligible for deposit by authorized insurers in the commonwealth, cash, a letter of credit issued by a qualified financial institution or another form of security authorized by the commissioner; or

(3) (i) maintain, or together with its parent company maintain, a net worth or stockholders' equity of \$25,000,000; and (ii) upon request, provide the commissioner with a copy of the provider's or the provider's parent company's most recent Form 10-K or Form 20-F filed with the United States Securities and Exchange Commission within the last calendar year, or if the company does not file with the United States Securities and Exchange Commission, a

77 copy of the company's financial statements showing a net worth of the provider or its parent
78 company of at least \$25,000,000. If the provider's parent company's Form 10-K, Form 20-F or
79 financial statements are filed to meet the provider's financial stability requirement, then the
80 parent company shall agree to guarantee the obligations of the provider relating to service
81 contracts sold by the provider in the commonwealth.

82 (e) Except for the requirements specified in subsections (c) and (d), no additional
83 registration submissions or financial security requirements shall be required by the commissioner
84 for service contract providers.

85 (f) Service contracts shall require the provider to permit the service contract holder to
86 return the service contract within 20 days of the date the service contract was mailed to the
87 service contract holder or within 10 days of delivery of the service contract to the service
88 contract holder if the service contract is delivered to the service contract holder at the time of
89 sale or within a longer time period permitted under the service contract. Upon return of the
90 service contract to the provider within the applicable time period, if no claim has been made
91 under the service contract prior to its return to the provider, the service contract shall be void and
92 the provider shall refund to the service contract holder, or credit the account of the service
93 contract holder or other payer of record, if different, the full purchase price of the service
94 contract. The right to void the service contract provided in this subsection shall not be
95 transferable and shall apply only to the original service contract purchaser if no claim has been
96 made prior to its return to the provider. A 10 per cent penalty per month shall be added to a
97 refund that is not paid or credited within 45 days after return of the service contract to the
98 provider.

99 (g) Provider fees collected on service contracts shall not be subject to premium taxes;
100 provided, however, that premiums for reimbursement insurance policies shall be subject to
101 premium taxes and all other applicable taxes.

102 (h) Except for the registration requirements in subsection (c), providers and related
103 service contracts sellers, administrators and other persons marketing, selling or offering to sell
104 service contracts shall not be required to hold any other form of license granted by the
105 commonwealth.

106 (i) Chapter 176D shall apply to all providers and related service contract sellers,
107 administrators and other persons marketing, selling or offering to sell service contracts; provided
108 however, a service contract shall not be considered to be insurance for any purpose under the
109 laws of the commonwealth and the marketing, sale, offering for sale, issuance, making,
110 proposing to make and administration of service contracts by providers and related service
111 contract sellers, administrators and other persons shall be exempt from all other provisions of
112 chapter 175, including any non-consumer commercial service contract.

113 (j) Service contracts may provide for the service, repair, replacement or maintenance of
114 real, tangible personal property for damage resulting from power surges and accidental damage
115 from handling and may provide for leak or repair coverage to roofing systems on residential
116 dwellings.

117 Section 149O. (a) Reimbursement insurance policies insuring service contracts issued,
118 sold or offered for sale in the commonwealth shall require the insurer that issued the
119 reimbursement insurance policy to reimburse or pay on behalf of the provider any covered sums

the provider is legally obligated to pay or, in the event of the provider's non-performance, shall provide the service which the provider is legally obligated to perform according to the provider's contractual obligations under the service contracts issued or sold by the provider.

(b) In the event covered service is not provided by the service contract provider within 60 days of proof of loss by the service contract holder, the contract holder may apply directly to the reimbursement insurance company.

Section 149P. Service contracts shall be printed in clear and understandable language and shall include: (1) a statement in substantially the following form: "Obligations of the provider under this service contract are insured under a service contract reimbursement insurance policy", or for service contracts not insured under a reimbursement insurance policy a statement in substantially the following form: "Obligations of the provider under this service contract are backed by the full faith and credit of the provider"; (2) the name and address of the insurer, including the reimbursement insurance policy insurer, provider, an administrator if different from the provider, the service contract seller and the service contract holder to the extent that the name of the service contract holder has been furnished by the service contract seller; (3) the total purchase price and the terms under which service contract was sold; (4) the existence of any deductible amount, if applicable; (5) the property and services to be provided and any limitations, exceptions or exclusions, if applicable; (6) any restrictions governing the transferability of the service contract; (7) the terms, restrictions or conditions governing cancellation of the service contract prior to the termination or expiration date of the service contract by either the provider or the service contract holder; provided, however, that the provider of the service contract shall mail a written notice to the contract holder, including the

effective date of the cancellation and the reason for the cancellation, at the last known address of the service contract holder contained in the records of the provider at least 5 days prior to cancellation by the provider unless the reason for cancellation is nonpayment of the provider, material misrepresentation or a substantial breach of duties by the service contract holder relating to the covered product or its use; (8) all of the obligations and duties of the service contract holder, such as the duty to protect against any further damage and any requirements to follow owner's manual; and (9) whether or not the service contract provides for any preexisting conditions.

Section 149Q. (a) A provider shall not: (i) use in its name the words insurance, casualty, surety, mutual or any other words descriptive of the insurance, casualty or surety business; or (ii) a name deceptively similar to the name or description of any insurance or surety corporation or to the name of any other provider; provided, however, that the words "guaranty", "warranty" or other similar words may be used.

(b) A provider or its representative shall not permit or cause to be made any false or misleading statement or deliberately omit any material statement that a reasonable person would considered misleading if omitted.

(c) A person shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property, but may promote, endorse or recommend the purchase unless otherwise prohibited by law.

Section 149R. (a) The provider shall keep accurate accounts, books and records concerning transactions regulated under sections 149M to 149W, inclusive, which shall include:

(i) copies of each type of service contract sold; (ii) the name and address of each service contract holder to the extent that the name and address have been furnished to the service contract provider; and (iii) written or electronic claims files which shall contain the dates and description of claims related to the service contract.

(b) Except as provided in subsection (d), the provider shall retain all records required to be maintained by this section for at least 1 year after the specified period of coverage has expired.

(c) Records required under sections 149M to 149W, inclusive, may be maintained in electronic format. If the records are maintained in a form other than hard copy, the records shall be capable of duplication to legible hard copy at the request of the commissioner.

(d) A provider discontinuing business in the commonwealth shall maintain its records until the commissioner certifies that the provider has furnished satisfactory proof that the provider has discharged all obligations to service contract holders in the commonwealth.

Section 149S. An insurer issuing a reimbursement insurance policy shall not terminate the policy until a notice of termination has been mailed or delivered to the commissioner. The termination of a reimbursement insurance policy shall not reduce the issuer's responsibility for service contracts issued by providers prior to the date of the termination.

Section 149T. (a) An insurer issuing reimbursement insurance to providers shall be considered to have received the premiums for such insurance upon the payment of provider fees by consumers for service contracts issued by such insured providers.

(b) Sections 149M to 149W, inclusive, shall not prevent or limit the right of an insurer which issued a reimbursement insurance policy to seek indemnification or subrogation against a provider if the insurer pays or is obligated to pay the service contract holder sums that the provider was obligated to pay under the service contract.

Section 149U. (a) The commissioner may conduct examinations of providers, administrators, insurers or other persons to enforce sections 149M to 149W, inclusive, and protect service contract holders. Upon request of the commissioner, the provider shall make all accounts, books and records concerning service contracts sold by the provider available to the commissioner which are necessary to enable the commissioner to reasonably determine whether the provider is complying with sections 149M to 149W, inclusive.

(b)(1) The commissioner may enforce sections 149M to 149W, inclusive. The commissioner may, without limitation: (i) issue a cease and desist order to prevent continuing violations of those sections; (ii) issue an order prohibiting a service contract provider from selling or offering for sale service contracts in violation of those sections; or (iii) issue an order imposing a civil penalty on that provider or any combination of the foregoing, as applicable.

(2) A person aggrieved by an order issued under this subsection may request a hearing before the commissioner. The request shall be filed with the commissioner within 20 days of the commissioner's order. If a hearing is requested, an order issued by the commissioner under this section shall be suspended from the original effective date of the order until completion of the hearing and final decision of the commissioner. At the hearing, the burden shall be on the commissioner to show why the order issued under this subsection is justified.

(3) The commissioner may bring an action in any court of competent jurisdiction for an injunction or other appropriate relief to enjoin threatened or existing violations of sections 149M to 149W, inclusive. An action filed under this paragraph may also seek restitution on behalf of persons aggrieved by a violation of said sections or orders or regulations of the commissioner.

(4) A person who is found to have violated sections 149M to 149W, inclusive, or orders or regulations of the commissioner issued under those sections, may be assessed a civil penalty in an amount determined by the commissioner of not more than \$500 per violation and not more than \$10,000 in the aggregate for all violations of a similar nature. For purposes of this section, violations shall be of a similar nature if the violation consists of the same or similar course of conduct, action or practice, irrespective of the number of times the act, conduct or practice which is determined to be a violation of said sections occurred.

Section 149V. The following shall be exempt from sections 149M to 149W, inclusive: (a) warranties, service contracts or maintenance agreements provided by public utilities that are regulated by the department of telecommunications and cable or the Federal Communications Commission, or by an affiliate of such entity, covering customer wiring, transmission devices serviced by such public utility or warranting services provided by such public utility or its affiliate; (b) mechanical breakdown insurance policies offered by insurers otherwise licensed and regulated under the insurance laws and regulations of the commonwealth; (c) warranties, service contracts or other agreements regarding automobiles; and (d) warranties offered by builders as part of a conveyance of real estate.

Section 149W. The commissioner may promulgate rules and regulations for the administration and enforcement of sections 149M to 149V, inclusive.

Section 149X. The commissioner shall retain all registration fees collected under subsection (c) of section 149N and fines collected under clause (4) of subsection (b) of section 149U; provided, however, that revenue in excess of \$100,000 annually shall revert to the General Fund. The retained revenue collected may be used by the commissioner to support the commissioner's registration, rulemaking and enforcement activities under sections 149M to 149W, inclusive.

SECTION 3. A person engaged in the service contract business, as a provider or otherwise, on or before the effective date of this act, who submits an application for registration as a provider under chapter 175 of the General Laws within 30 days after the commissioner makes the application available, may continue to engage in business as a provider until final agency action is taken by the commissioner regarding the registration application and all rights to administrative judicial review have been exhausted or expired. Said chapter 175 shall govern all service contracts issued after the effective date of this act. Contracts in effect on the effective date of this act shall be governed by said chapter 175 upon renewal of the contract.

SECTION 4. Notwithstanding any general or special law to the contrary, section 149Q of chapter 175 of the General Laws shall not apply to a company using any of the prohibited language in its name prior to the effective date of said section 149Q; provided, however, that a company using such prohibited language in its name shall include in its service contracts a statement in substantially the following form: "This agreement is not an insurance contract."